In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
ANDREA O. RAHN)		
(Chapter 13 Case 93-40684)	)	Number 93-4079
	)	
Debtor	)	
	)	
	)	
	)	
ANDREA O. RAHN)		
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
BANK SOUTH, N.A.)		
	)	
Defendant	)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff filed this adversary proceeding on May 21, 1993. On August 10, 1993, Defendant filed a Motion for Summary Judgment along with an affidavit and brief in support of the motion. Plaintiff has not filed a response to the motion. Upon consideration of the affidavits, briefs, documentation submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff filed a Chapter 13 petition and instituted this proceeding on May 21, 1993. Several days prior, on or about May 14, 1993, Defendant had repossessed the automobile which Plaintiff relies on as her primary source of transportation. The automobile is a 1987 Nissan Sentra.

In her Complaint, Plaintiff averred that the vehicle was necessary for her effective reorganization under Chapter 13. Consequently, Plaintiff requested a temporary restraining order against the Defendant and sought the return of the vehicle. Defendant was served with a copy of the Complaint, although the Complaint did not identify the record title holder of the vehicle or provide a vehicle identification number.

On June 8, 1993, this Court held a hearing on Plaintiff's request for a temporary restraining order. Defendant was not notified of the hearing and did not attend or participate in the proceeding. On June 21, 1993, I entered an order requiring Defendant to turnover the vehicle to Plaintiff conditioned on Plaintiff paying Defendant as fully secured and presenting proof of insurance providing full coverage on the vehicle and naming Defendant as loss payee.

On June 22, 1993, Defendant sold the vehicle at auction. On June 30, 1993, Mark Bulovic, an attorney in Savannah, received a copy of my order dated June 21, 1993 and, on the same day, faxed it to Defendant. Although Mr. Bulovic occasionally appears on

behalf of Defendant, he is not counsel of record for Defendant in this matter.

Plaintiff is not a record title holder of the vehicle and is neither a customer of Defendant or borrower on the Note which is secured by the vehicle. Plaintiff's interest in the vehicle apparently arises from a divorce proceeding in which she was awarded possession of the vehicle. Plaintiff never presented Defendant with any documentation reflecting Plaintiff's interest in the vehicle nor has Plaintiff made any request to retitle the vehicle in her name.

Plaintiff's ex-husband, Michael S. Rahn, is the maker of the Note which the vehicle secures as well as the record title holder of the vehicle. Apparently, he failed to make timely payments on the obligation, and, as a result, Defendant exercised its right of repossession, removing the vehicle from Plaintiff's possession.

Defendant makes several contentions in its Brief in Support of Motion for Summary Judgment. First, Defendant contends that the vehicle is not property of Plaintiff's bankruptcy estate because Plaintiff is not the record title holder of the vehicle or borrower on the Note which the vehicle secures. Second, Defendant contends that it was not adequately notified of Plaintiff's interest in the vehicle either before Plaintiff filed her Chapter 13 case or thereafter. Third, Defendant contends that it should not be a forced participant in Plaintiff's Chapter 13 plan because Plaintiff is a complete stranger to Defendant. Finally, Defendant contends that Plaintiff's proper remedy is against her ex-husband because he is the only party obligated to provide Plaintiff with transportation and,

by not making timely payments on the Note, he has failed to satisfy his obligation.

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Fed.R.Civ.P. 56 which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . " U.S. v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (quoting Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982).) *See also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 160, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). The trial court should not weigh the evidence or make credibility determinations when deciding a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the

movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. *See* U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991); Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1022 (11th Cir. 1988); Kramer v. Unitas, 831 F.2d 994, 997 (11th Cir. 1987).

Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 106 S.Ct. at 2552. *See also* Brockington v. Certified Elec. Inc., 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d (1991) (adopting the relevant portions of the District Court order and affirming S.D. Ga., No. CV288-111, April 18, 1989, Alaimo, Chief Judge).

A non-moving party cannot rely on merely allegations, pleadings and legal conclusions. *See* Celotex, 106 S.Ct. at 2553, Anderson v. Liberty Lobby, Inc., 106 S.Ct. at 2510; Livernois, 837 F.2d at 1022. *See generally* Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991). The non-moving party must come forth with some evidence to show that a genuine issue of material fact exists. U.S. v. Four Parcels of Real Property, 941 F.2d at 1438.

The trial court "must consider all the evidence in the light most favorable to the non-moving party," Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987), and "resolve all reasonable doubts in favor of the non-moving party." Barnes v. Southwest Forest Indus., Inc., 814 F.2d 607, 609 (11th Cir. 1987). *See also* Earley v. Champion Intern. Corp., 907 F.2d 1077 (11th Cir. 1990); Brockington v. Certified Elec. Inc., 903 F.2d at 1527.

"The requirement is that there be no genuine issue of a material fact." Anderson, 477 U.S. at 247-48, 106 S.Ct. at 2510 (emphasis original). *See also* Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991).

11 U.S.C. Section 541(a)(1) provides, in relevant part, that "[the bankruptcy] estate is comprised of all the following property, wherever located and by whomever held: . . . [A]ll legal or equitable interests of the debtor in property as of the commencement of the case." The legislative history to section 541(a) reveals that:

> The scope of [section 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property. . . The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or leasehold interest, for example.

HR Rep No. 595, 95th Cong., 1st Sess. 367-68 (1977); S Rep No. 989, 95th Cong., 2d Sess. 82-83 (1978) (emphasis added).

Thus, it is clear that, even though the vehicle was not titled in Plaintiff's name, it was part of her bankruptcy estate under section 541(a)(1) because she had a possessory interest in the vehicle by virtue of her divorce decree. Therefore, Plaintiff had the right, under 11 U.S.C. Section 542(a), to seek the turnover of the vehicle from Defendant.

Section 542(a) generally provides that an entity in possession of property

belonging to the bankruptcy estate during the pendency of the case must deliver the property to the trustee or account for the property, unless the property is of inconsequential value or benefit to the estate. Section 542(c), however, creates an exception to the general rule of section 542(a). The critical question then is whether Defendant's actions fall within the exception created in section 542(c).

> 11 U.S.C. Section 542(c) provides, in relevant part:
>
> [A]n entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate . . . in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

This provision creates an exception to section 542(a) for a party who, without actual notice or knowledge that a debtor has filed a petition in bankruptcy, transfers in good faith property which would otherwise form a part of the debtor's estate. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 369 (1977); S Rep No. 989, 95th Cong., 2d Sess. 84 (1978). The transfer is given the same legal effect that it would have had if the debtor had not filed a case in bankruptcy.

In the case at bar, Defendant was served with a copy of Plaintiff's Complaint, but the Complaint failed to adequately describe the vehicle or Plaintiff's interest therein. The Complaint did not provide a vehicle identification number, give any indication that the borrower on the vehicle was Michael S. Rahn or that the vehicle was actually titled

in Mr. Rahn's name. Consequently, Defendant was effectively deprived of notice that Plaintiff was claiming, as part of her bankruptcy estate, an interest in the 1987 Nissan Sentra titled in her ex-husband's name.

Furthermore, Defendant had no notice of the hearing held on June 8, 1993, and had no actual knowledge of the Temporary Restraining Order, filed June 21, 1993, requiring Defendant to return the vehicle to Plaintiff until June 30, 1993, eight days after Defendant had sold the vehicle at auction.

I therefore conclude that Defendant has made a *prima facie* showing that it did not receive adequate notice of the relationship between Plaintiff's bankruptcy and the vehicle in time to stop the vehicle from being sold at auction. Plaintiff has not filed any response to Defendant's Motion and has failed to rebut Defendant's *prima facie* case. Consequently, under section 542(c), Defendant's sale of the vehicle at auction is given full legal effect as if Plaintiff's Chapter 13 case had never been commenced.

Since Plaintiff has no legal interest in the car or legal relationship with Defendant, Plaintiff's estate is not entitled to any proceeds realized by Defendant from the sale of the vehicle. Defendant does not bear the obligation to provide Plaintiff with transportation. That obligation belongs exclusively to Plaintiff's ex-husband.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant's Motion for Summary Judgment be GRANTED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of September, 1993.